

FILED
COURT OF APPEALS
DIVISION II

2015 OCT 19 PM 1:18

STATE OF WASHINGTON

~~DEPUTY~~

No: 46347-4-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

FEARGHAL MCCARTHY; CONOR MCCARTHY, a minor, by
and through Fearghal McCarthy, his father; and CORMAC
MCCARTHY, a minor, by and through Fearghal McCarthy, his
father,

Appellants

vs.

COUNTY OF CLARK, CITY OF VANCOUVER,
DEPARTMENT OF SOCIAL AND HEALTH SERVICES,
CHILDREN'S PROTECTIVE SERVICES,

Respondents

Appeal from the Superior Court of Clark County
Case No: 08-2-04895-4

**REPLY BRIEF OF APPELLANT
FEARGHAL MCCARTHY**

Fearghal McCarthy
Appellant, pro-se;

17508 NE 38th Way,
Vancouver, WA 98682
360-944-8200
fearghalmccarthy001@gmail.com

PM 10-16-15-

TABLE OF CONTENTS

Table of Authorities	v
I. INTRODUCTION TO REPLY	1
II. SUPPLEMENTAL STATEMENT OF FACTS.....	1
III. ARGUMENT IN REPLY.....	1
A. EQUITABLE ESTOPPEL AND WAIVER PRECLUDE THE STATUTE OF LIMITATIONS AFFIRMATIVE DEFENSE FOR THE FALSE ARREST/IMPRISONMENT CLAIMS.	1
B. SUMMARY JUDGMENT DISMISSAL OF THE FALSE ARREST/IMPRISONMENT CLAIMS IS ERROR BECAUSE PROBABLE CAUSE IS A QUESTION OF FACT FOR A JURY.	3
1. The evidence fails to conclusively and without contradiction establish that Kingrey had probable cause to arrest Fearghal.	3
2. The Alford Plea entered by Judge Robert Lewis has no preclusive effect on Fearghal's false arrest and false imprisonment claims.	4
3. Judge Schreiber's finding does not "cleanse the transaction".	5
C. PETTY ENGAGED IN INVESTIGATIVE AND OTHER NON-PROSECUTORIAL ACTS THAT ARE NOT SHIELDED BY ABSOLUTE IMMUNITY.	5
1. Summary of Argument	5
2. Absolute immunity does not expand to immunize prosecutors who step outside their prosecutorial role to conduct investigative activities or to improperly influence civil proceedings.	6
3. Genuine issues of material fact evidence Petty's acts are not shielded by absolute immunity. Any immunity analysis must construe all facts and inferences in favor of Appellants and against the City.	9
D. THE "SUBSTANTIAL FACTOR" TEST WAS RAISED IN THE TRIAL COURT AND DOES NOT OFFEND TYNER.	13
E. ALL CLAIMS AGAINST THE CITY WITHSTAND SUMMARY JUDGMENT.	15
1. All evidence in the record is admissible against the City	15
2. Claims against the City share common facts and were not abandoned.	16
3. Negligent Investigation	17
4. <i>Malicious Interference with Parent-Child Relationship</i>	18
5. Fearghal's gender discrimination and RCW 10.99/26.50 negligence claims withstand summary judgment. (Taylor and Petty)	19
F. THE TRIAL COURT'S EXCLUSION OF PATRICIA'S CORRECTION PAGES AS CORRECTED DEPOSITION TESTIMONY WAS AN ABUSE OF DISCRETION.	20
G. THE COUNTY IS NOT ENTITLED TO QUALIFIED IMMUNITY.....	23

TABLE OF CONTENTS (continued)

H.	FEARGHAL’S INVOLUNTARY SEPARATION FROM HIS CHILDREN CONSTITUTES A “HARMFUL PLACEMENT” THAT IS ACTIONABLE UNDER RCW 26.44.	24
I.	THE LEGISLATIVE PURPOSE OF RCW 26.44 ESTABLISHES LEGAL CAUSATION FOR RESPONDENTS’ NEGLIGENT INVESTIGATIONS AND BREACHES OF DUTY.	25
1.	Respondents’ liability arises from their abrogation of duties owed under RCW 26.44, not from non-participation in court proceedings.	25
2.	A negligent investigation claim is not limited to harmful placement decisions arising only from dependency proceedings.	26
3.	Commencement of legal causation for DSHS.	27
4.	No exemption from legal liability exists for negligent intake decisions.	27
5.	Legal causation exists for all Clark County’s negligent investigations.	27
J.	REASONABLE MINDS COULD AND DID DIFFER AS TO THE EXISTENCE OF CAUSE-IN-FACT FOR NEGLIGENT INVESTIGATION.	28
K.	A JURY COULD DETERMINE THAT DSHS’ NEGLIGENT INVESTIGATION DEPRIVED COURTS OF INFORMATION MATERIAL TO COURT PLACEMENT DECISIONS.	29
1.	The State cannot prove the absence of facts that a jury could determine as information material to court placement decisions.	29
2.	DSHS cannot abrogate its duties to the Courts or to Fearghal.	31
3.	Depriving criminal courts of material information does not shed liability. ...	31
L.	A JURY COULD DETERMINE THAT THE COUNTY’S NEGLIGENT INVESTIGATIONS DEPRIVED COURTS OF INFORMATION MATERIAL TO COURT PLACEMENT DECISIONS.	32
1.	The County cannot prove the absence of facts that a jury could determine as information material to court placement decisions.	32
2.	No court’s no-contact orders break the causal chain.	33
M.	THE NEGLIGENCE CLAIM AGAINST THE COUNTY WITHSTANDS SUMMARY JUDGMENT BECAUSE THE COUNTY DOES NOT ENJOY QUALIFIED IMMUNITY.	35
N.	FEARGHAL’S CLAIMS AGAINST DSHS FOR NEGLIGENCE AND WANTON MISCONDUCT WITHSTAND SUMMARY JUDGMENT.	36
O.	THE CLAIMS FOR NEGLIGENT INFLECTION OF EMOTIONAL DISTRESS (“NIED”) AGAINST THE STATE, COUNTY AND THE CITY WITHSTAND SUMMARY JUDGMENT.	37
P.	THE CLAIMS OF OUTRAGE AGAINST THE COUNTY AND THE CITY WITHSTAND SUMMARY JUDGMENT.	39
Q.	RESPONDENTS ARE NOT ENTITLED TO COSTS OR ATTORNEY’S FEES ON APPEAL.	39

TABLE OF CONTENTS (continued)

IV. CONCLUSION 40

APPENDIX A - DUTIES OWED BY DSHS TO FEARGHAL

APPENDIX B - TRIAL COURT RECORD RE THE SUBSTANTIAL FACTOR TEST

APPENDIX C - KECK V. COLLINS, NO.90357-3 (SEPT. 24, 2015), EXTRACT

Table of Authorities

UNITED STATES SUPREME COURT CASES

Buckley v. Fitzsimmons, 509 U.S. 259, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993)	7, 8, 12, 13
Burns v. Reed, 500 U.S. 478, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991)	6, 8
Imbler v. Pachtman, 424 U.S. 409, 47 L.Ed.2d 128, 96 S.Ct. 984 (1976)	6, 40
Kalina v. Fletcher, 522 U.S. 118, 118 S.Ct. 502, 139 L.Ed.2d 471 (1997)	6
North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)	5

UNITED STATES COURT OF APPEAL CASES

al-Kidd v. Ashcroft, 580 F.3d 949, 963 (9th Cir. 2009).....	6
Demery v. Kupperman, 735 F.2d 1139 (9th Cir. 1984)	8
Light v. Haws, 472 F.3d 74, 80-81 (3d Cir.2007).....	6
Milstein v. Cooley, 257 F.3d 1004, 1009 n.5 (9th Cir. 2001).....	8
Odd v. Malone, 538 F.3d 202, 208 (3d Cir. 2008).....	6
Robichaud v. Ronan, 351 F.2d 533, 536-537 (9th Cir.1965).....	6

UNITED STATES DISTRICT COURT CASES

Cunningham v. City of Wenatchee, 214 F.Supp.2d 1103 (E.D.Wash.2002)	32
In re Scott County, 672 F. Supp. 1152, (D. Minn. 1987)	32

WASHINGTON CASES

Adkisson v. Seattle, 42 Wn.2d 676, 258 P.2d 461 (1953).....	36
Allison v. Hous. Auth. of Seattle, 118 Wn.2d 79, 821 P.2d 34 (1991)	13, 14
Atherton Condo. v. Blume Dev. Co., 115 Wn.2d 506, 799 P.2d 250 (1990).....	9, 29
Babcock v. State, 116 Wn.2d 596, 809 P.2d 143 (1991)	23, 32
Beggs v. DSHS, 171 Wn.2d 69, 247 P.3d 421 (2011)	36
Bender v. City of Seattle, 99 Wn.2d 582, 664 P.2d 492 (1983)	3, 5, 32, 33
Berry v. Crown Cork & Seal Co., 103 Wn. App. 312, 14 P.3d 789 (2000)	16
Bishop v. Miche, 137 Wn.2d 518, 973 P.2d 465 (1999)	31
Clark v. Baines, 150 Wn.2d 905, 84 P.3d 245 (2004).....	4
Daniel v. State, 36 Wn. App. 59, 671 P.2d 802 (1983)	3
Daugert v. Pappas, 104 Wn.2d 254, 704 P.2d 600 (1985).....	14
Donaldson v. City of Seattle, 65 Wn. App. 661, 831 P.2d 1098 (1992)	35
Fabrique v. Choice Hotels Int'l, Inc., 144 Wn. App. 675, 183 P.3d 1118 (2008)	15
Folsom v. Burger King, 135 Wn.2d 658, 958 P.2d 301 (1998).....	16, 20
Gausik v. Abbey, 126 Wn. App. 868, 107 P.3d 98 (2005)	31

Table of Authorities (continued)

WASHINGTON CASES (CONTINUED)

Gilliam v. DSHS, 89 Wn. App. 569, 950 P.2d 20 (1998)	6, 7, 13, 17
Greenhalgh v. Dept. of Corrections, 170 Wn. App. 137, 282 P.3d 1175 (2012)	1
Guffey v. State, 103 Wn.2d 144, 690 P.2d 1163 (1984)	23
Gurno v. LaConner, 65 Wn. App. 218, 828 P.2d 49 (1992)	36
Hannum v. Friedt, 88 Wn. App. 881, 947, P.2d 760 (1997)	9
Harvey v. Obermeit, 163 Wn. App. 311, 261 P.3d 671 (2011)	1
Hegel v. McMahon, 136 Wn.2d 122, 960 P.2d 424 (1998)	38
Hertog v. City of Seattle, 138 Wn.2d 265, 979 P.2d 400 (1999)	31
Hunsley v. Giard, 87 Wn. 2d 424, 553 P.2d 1096 (1976)	39
In re Barr, 102 Wn.2d 265, 684 P.2d 712 (1984)	5
Keck v. Collins, 181 Wn. App. 67, 325 P.3d 306 (2014)	16
Keck v. Collins, No.90357-3 (Sept. 24, 2015)	21, 23
Kramarevsky v. DSHS, 122 Wn.2d 738, 863 P.2d 535 (1993)	2
Lewis v. Whatcom County, 136 Wn. App. 450, 149 P.3d 686 (2006)	24
Lybbert v. Grant County, 141 Wn.2d 29, 1 P.3d 1124 (2000)	3
M.W. v. DSHS, 149 Wn.2d 589, 70 P.3d 954 (2003)	24
Mackay v. Acorn Custom Cabinetry, Inc., 127 Wn.2d 302, 898 P.2d 284 (1995)	13
Mission Springs, Inc. v. City of Spokane, 134 Wn.2d 947, 954 P.2d 250 (1998)	23
Morse v. Antonellis, 149 Wash.2d 572, 70 P.3d 125 (2003)	9
Petcu v. State, 121 Wn. App. 36, 86 P.3d 1234 (2004)	31
Port of Pasco v. Stadelman Fruit Inc., 60 Wn. App. 32, 802 P.2d 799 (1990)	3
Preston v. Duncan, 55 Wn.2d 678, 349 P.2d 605 (1960)	23
Price v. State, 114 Wn. App. 65, 57 P.3d 639 (2002)	37
Rainier Nat'l Bank v. Lewis, 30 Wn. App. 419, 635 P.2d 153 (1981)	2
Roberson v. Perez, 156 Wn.2d 33, 123 P.3d 844 (2005)	25, 28
Robinson v. Seattle, 119 Wn.2d 34, 830 P.2d 318 (1992)	23
Rodriguez v. Perez, 99 Wn. App. 439, 994 P.2d 874 (2000)	24, 26
Rounds v. Union Bankers Ins. Co., 22 Wn. App. 613, 590 P.2d 1286 (1979)	9
Roy v. City of Everett, 118 Wn.2d 352, 823 P.2d 1084 (1992)	36
Savage v. State, 127 Wn.2d 434, 899 P.2d 1270 (1995)	23
Schmidt v. Coogan, 181 Wn.2d 661, 335 P.3d 424, 432 (2014)	37
Schmitt v. Langenour, 162 Wn. App. 397, 256 P.3d 1235 (2011)	8
Schooley v. Pinch's Deli Market, Inc., 134 Wn.2d 468, 951 P.2d 749 (1998)	28
Sharbono v. Universal Underwriters Ins. Co., 139 Wn. App. 383, 161 P.3d 406 (2007) ..	14
Staats v. Brown, 139 Wn.2d 757, 991 P.2d 615 (2000)	9, 23, 35
State v. Anderson, 105 Wn. App. 223, 19 P.3d 1094 (2001)	4
State v. McDonald, 90 Wn. App. 604, 953 P.2d 470 (1998)	14

Table of Authorities (continued)

WASHINGTON CASES (CONTINUED)

State v. Newton, 87 Wn.2d 363, 552 P.2d 682 (1976)	5
State v. Turner, 118 Wn. App. 135, 74 P.3d 1215 (2003)	35
Strong v. Terrell, 147 Wn. App. 376, 195 P.3d 977 (2008)	38
Tyner v. DSHS, 92 Wn. App. 504, 963 P.2d 215 (1998)	26
Tyner v. State Dep't of Soc. & Health Serv., 141 Wn.2d 68, 1 P.3d 1148 (2000)	passim
Waller v. State, 64 Wash. App. 318, 824 P.2d 1225 (1992)	18
West v. Gregoire, 184 Wn. App. 164, 336 P.3d 110, 113 (2014)	16
Wilmot v. Kaiser Aluminum & Chem. Corp., 118 Wn.2d 46, 821 P.2d 18 (1991)	14
Yonker v. DSHS, 85 Wn. App. 71, 930 P.2d 958 (1997)	24, 28

WASHINGTON STATUTES

RCW 10.99.010	20, 35
RCW 10.99.055	12, 19, 35
RCW 10.99.060	20
RCW 10.99.070	36
RCW 26.09.060(7)	35
RCW 26.44.010	24, 26, 37
RCW 26.44.020(14)	17
RCW 26.44.030(1)(a)	3
RCW 26.44.030(11)	27
RCW 26.44.030(12)(a)	29, Appendix A
RCW 26.44.030(14)(a)(i)	Appendix A
RCW 26.44.035(1)	15
RCW 26.44.050	17, 23, 28, 31
RCW 26.44.100	37
RCW 26.44.100(1)	24, 26
RCW 26.44.100(2)	Appendix A
RCW 26.44.195(2)	32
RCW 26.44.280	18
RCW 26.50.010(1)	35
RCW 26.50.110	19, 35
RCW 26.50.110(1)(a)(i)	19, 35
RCW 4.24.595	18
RCW 9A.46.110	35
RCW 9A.72.120(1)(a)	22

Table of Authorities (continued)

RULES

CR 15(b)(2)	13, 36
CR 30(e)	21
CR 31	22
CR 54(b)	15, 19
CR 56(c)	16
CR 8(b)	2
CR 8(c)	1, 2
RAP 9.12	16

WASHINGTON ADMINISTRATIVE CODE

WAC 388-15-017(2)	27
WAC 388-15-017(3)	27
WAC 388-15-017(5)	27
WAC 388-15-021(2)	Appendix A
WAC 388-15-021(5)	Appendix A
WAC 388-15-021(7)	Appendix A
WAC 388-15-045	Appendix A
WAC 388-15-065	Appendix A
WAC 388-15-069	Appendix A

DSHS CHILDREN'S ADMINISTRATION REGULATIONS

Practices and Procedures Guide (CPS Guide), ¶2331.4.b	27, Appendix A
---	----------------

OTHER AUTHORITIES

SAVE, a 501(c)(3) non-profit victim advocacy organization, <i>Incentives to Make False Allegations of Domestic Violence</i> , available for download at http://www.saveservices.org/reports/	40
---	----

I. INTRODUCTION TO REPLY

The County and State primarily contend that reasonable minds could not differ as to the cause-in-fact element of negligent investigation; but Judge Nichols' denial of summary judgment shows that this contention is meritless.

Nor do Respondents' theories seeking to narrow the legislative intent to protect the parent-child bond overcome strong public policy enacted in RCW 26.44.010 establishing legal causation for Respondents' breaches of duty.

This case is on appeal because Judge Collier, who inherited the case from Judge Nichols, stated that he "may just be a conduit to three wiser people" declining to make any findings or conclusions of law. RP 263.

II. SUPPLEMENTAL STATEMENT OF FACTS

The State now admits that nurse practitioner Ms. Hill's medical report "contradicted [the] cause of the alleged injury". State's Brief, pg 9. DSHS changed its investigative findings from "founded" to "inconclusive" after reviewing Ms. Hill's medical report, evidence as to Patricia's lack of credibility (e.g. substance abuse) and other factors. State's Brief, pg 9.

III. ARGUMENT IN REPLY

A. Equitable estoppel and waiver preclude the statute of limitations affirmative defense for the false arrest/imprisonment claims.

"A party waives a statute of limitations affirmative defense (1) by engaging in conduct that is inconsistent with that party's later assertion of the defense or (2) by being dilatory in asserting the defense." Greenhalgh v. Dept. of Corrections, 170 Wn. App. 137, 144, 282 P.3d 1175 (2012); citing Harvey v. Obermeit, 163 Wn. App. 311, 323, 261 P.3d 671 (2011); CR 8(c). The County's actions meet both these criteria.

“A party shall state in short and plain terms the defenses to *each claim asserted...*” CR 8(b). In its Answer, the County did not identify the statute of limitations affirmative defense as being applicable to the false arrest and false imprisonment claims as required by CR 8(b). CP 2274. CP 2278. Affirmative defenses that are not properly pleaded are generally deemed waived. Rainier Nat'l Bank v. Lewis, 30 Wn. App. 419, 422, 635 P.2d 153 (1981). By not complying with CR 8(b), the County failed to provide adequate notice to the Appellants thereby waiving the statute of limitations affirmative defense for the false arrest and false imprisonment claims.

A second and more glaring waiver by the County of the statute of limitations affirmative defense is the County's failure to assert this affirmative defense anywhere in its Motion/Memorandum for Summary Judgment or in its Reply Brief. CP 1101-1118. CP 1249-1255. CR 8(c).

Equitable estoppel requires "a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon." Kramarevsky v. DSHS, 122 Wn.2d 738, 743, 863 P.2d 535 (1993). The County's failure to assert the statute of limitations affirmative defense on summary judgment denied Fearghal the opportunity to present rebuttal and to argue that the statute of limitations for the false arrest/imprisonment claims did not begin until a year his June 2005 arrest.¹ “When substantial rights of the parties will be affected, affirmative defenses may not be raised for the first time on appeal.” Port of Pasco v. Stadelman Fruit Inc., 60 Wn. App. 32, 37,

¹ Not until over a year after 6/6/15 did Fearghal discover information that Kingrey lacked probable cause: e.g. Kingrey's probable cause declaration omitted that Cormac had no visible injuries; Kingrey falsely represented to Fearghal that he had interviewed Conor; and more.

802 P.2d 799 (1990). Accordingly, equitable estoppel precludes the County from raising this affirmative defense for the first time on appeal. Lybbert v. Grant County, 141 Wn.2d 29, 38-39, 1 P.3d 1124 (2000).

B. Summary Judgment dismissal of the false arrest/imprisonment claims is error because probable cause is a question of fact for a jury.

1. The evidence fails to conclusively and without contradiction establish that Kingrey had probable cause to arrest Fearghal.

“Unless the evidence conclusively and without contradiction establishes the lawfulness of the arrest, it is a question of fact for the jury to determine whether an arresting officer acted with probable cause.” Daniel v. State, 36 Wn. App. 59, 62, 671 P.2d 802 (1983).

Lt. Hall provided expert testimony that Kingrey lacked probable cause to make an arrest pointing out that Kingrey failed to meet or interview Conor, failed to reconcile Patricia’s report of a violent assault on Cormac with her contradictory report that Cormac had “no visible injuries”, he relied on Patricia’s mother who was not present on 6/3/2005; Kingrey failed to personally examine Cormac for injuries or show any concern that Cormac, just turned two, ought to have been medically examined for head trauma if there was any probable cause to believe that Patricia’s allegations were true.

Because there is conflicting testimony as to probable cause, a factual issue exists and Fearghal is entitled to have his claim put before the jury. See Bender v. City of Seattle, 99 Wn.2d 582, 594, 664 P.2d 492 (1983).

Notably, the DV prosecutor dropped Kingrey’s DV Assault IV charge alleging Fearghal assaulted Patricia because there was no credible evidence.

Kingrey’s failure to report abuse to DSHS, despite his duty to do so under RCW 26.44.030(1)(a) if he had “reasonable cause to believe” that Cormac was abused, implies he did not have reasonable cause or probable

cause to believe that Cormac was abused.² Kingrey ignored exculpatory evidence: i) there were no visible injuries or bruises on Cormac; ii) Patricia was high on prescription narcotics at the time of the alleged incident causing her perceptions to be impaired; iii) Patricia was abusing both prescription narcotics and anxiety medications regularly; and iv) Patricia was receiving mental health treatment for delusions and anxiety exasperated by the upcoming one year anniversary of her sister's suicide. CP 1557.

Unlike Kingrey, when Deputy Zimmerman investigated a similar allegation by Patricia that Fearghal assaulted Cormac, he interviewed the children and the medical examiner; and then determined there was no probable cause based on the lack of any corroborative evidence. CP 1796.

Viewing all factual inferences in Fearghal's favor, Kingrey arrested Fearghal on mere speculation and his gender-biased personal beliefs; but this does not establish probable cause. State v. Anderson, 105 Wn. App. 223, 229, 19 P.3d 1094 (2001). Because the evidence fails to conclusively and without contradiction establish that Kingrey had probable cause to arrest Fearghal; the materiality given to these contradictory facts belongs to a jury.

2. The Alford Plea entered by Judge Robert Lewis has no preclusive effect on Fearghal's false arrest and false imprisonment claims.

"An *Alford* plea cannot be said to be preclusive of the underlying facts and issues in a subsequent civil action." Clark v. Baines, 150 Wn.2d 905, 916, 84 P.3d 245 (2004). Fearghal entered an *Alford/Newton* plea to the

² Kingrey testified it didn't matter to him whether Patricia or her mother had issues of veracity; he "*made no allowance*" that any of Fearghal's statements might have been true; he felt Fearghal's denial of the allegation was evidence of guilt not of innocence; and he arrested Fearghal because "*he thought a no-contact order would be a good thing...and the only way to get that was to arrest Fearghal.*"

Disorderly Conduct (non-DV) charge as stated in the Second Amended Information. CP 1687; 1695. Based on this plea, Judge Lewis found a factual basis for the *disorderly conduct* charge, not for the DV charge. CP 1714. The trial court found “Fearghal entered an *Alford/Newton* plea to disorderly conduct”, not an *In re Barr* plea.³ CP 1267-69. Thus, despite the County’s contention, Fearghal’s *Alford/Newton* plea to Disorderly Conduct and Judge Lewis’s findings has no preclusive effect to this matter.

3. Judge Schreiber’s finding does not “cleanse the transaction”.

Because Kingrey controlled the flow of information to Judge Schreiber, Judge Schreiber’s finding of probable cause “does not cleanse the transaction”; and a jury is not precluded from determining whether Kingrey falsely arrested Fearghal. *Bender v. City of Seattle*, 99 Wn.2d 582, 592, 664 P.2d 492 (1983). The County provides no rebuttal authority.

C. Petty engaged in investigative and other non-prosecutorial acts that are not shielded by absolute immunity.

1. Summary of Argument

The City mischaracterizes Appellants’ complaints as related to Petty’s filing or non-filing of charges. But Fearghal does not complain as to Petty’s prosecutorial acts. Instead, Fearghal presents evidence that Petty stepped outside her prosecutorial role to conduct investigative activities solely to influence court placement decisions that separated Fearghal from his children, and ultimately, to cause Fearghal to be deported so as to permanently separate

³ A defendant may plead criminally guilty while maintaining factual innocence. *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970); *State v. Newton*, 87 Wn.2d 363, 552 P.2d 682 (1976). This contrasts with an *In Re Barr* plea, where a defendant pleads guilty to a charge *lesser than that stated in the Information* and *without* asserting his innocence. *In re Barr*, 102 Wn.2d 265, 684 P.2d 712 (1984).

Fearghal from his children. Petty acted tortuously and discriminatory outside her prosecutorial role based on her rigid gender- biased motives.

2. *Absolute immunity does not expand to immunize prosecutors who step outside their prosecutorial role to conduct investigative activities or to improperly influence civil proceedings.*
-

“A prosecutor bears the ‘heavy burden’ of establishing entitlement to absolute immunity.” Odd v. Malone, 538 F.3d 202, 208 (3d Cir. 2008), (quoting Light v. Haws, 472 F.3d 74, 80-81 (3d Cir.2007)). The City has not met its burden because “only those functions which are subjected to the ‘crucible of the judicial process’...warrant immunity.” Gilliam v. DSHS, 89 Wn. App. 569, 583 950 P.2d 20 (1998). Federal courts have repeatedly declined to expand prosecutorial immunity to investigative or other non-advocacy acts.⁴ The US Supreme Court “purposefully left standing appellate case law holding that absolute immunity did not apply to a prosecutor's investigative function.” Babcock v. State, 116 Wn.2d at 610, citing Imbler v. Pachtman, 424 U.S. 409, 430, 47 L.Ed.2d 128, 96 S.Ct. 984 (1976).

No Washington court has held that a prosecutor’s investigative acts,

⁴ Odd v. Malone, at 208, (“immunity attaches to actions ‘intimately associated with the judicial phases of litigation,’ but not to administrative or investigatory actions unrelated to initiating and conducting judicial proceedings”); Kalina v. Fletcher, 522 U.S. 118, 118 S.Ct. 502, 139 L.Ed.2d 471 (1997), (a prosecutor’s false affidavit in support of an arrest warrant does not enjoy absolute immunity as police officers have no similar immunity”); Burns v. Reed, 500 U.S. 478, 495, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991), (a prosecutor's legal advice to police on investigative techniques is not shielded by absolute immunity, absolute immunity is not so expansive as to shield a prosecutor’s participation in investigative activity); Imbler v. Pachtman, 424 U.S. 409, (“a prosecutor engaged in certain investigative activities enjoys, not the absolute immunity associated with the judicial process, but only a good-faith defense comparable to the policeman’s.” Id. at 430); al-Kidd v. Ashcroft, 580 F.3d 949, 963 (9th Cir. 2009), (a material witness warrant obtained to investigate a crime rather than secure trial testimony is not entitled to absolute immunity as it is investigative in nature); Robichaud v. Ronan, 351 F.2d 533, 536-537 (9th Cir.1965), (prosecutorial immunity is not a matter of status, but rests upon whether the alleged wrongful acts are an integral part of the judicial process; acts related to police activity and coercion of false testimony have no immunity).

such as Petty's, enjoy absolute immunity. See Gilliam, at 583, ("When a prosecutor performs investigative functions normally performed by a detective or police officer, it is 'neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other'"), citing Buckley v. Fitzsimmons, 509 U.S. 259, 273, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993); Babcock, at 610, ("Even prosecutors cannot claim unqualified immunity for performing investigatory functions"); Tyner v. DSHS, 92 Wn. App at 520, ("Absolute immunity is accorded only to those functions that are an integral part of a judicial proceeding"); Rodriguez v. Perez, at 450, (a prosecutor who engages in functions outside the scope of prosecutorial duties is exposed to the same liability as other persons performing those same functions).

Buckley v. Fitzsimmons is instructive. Just like the prosecutor's use a witness to gather evidence *prior to an arrest* in Buckley, Petty's use of Patricia to gather evidence to support *new* alleged crimes (no-contact order violations, witness tampering) *prior to any police involvement* is a non-immunized investigative activity. Absolute immunity does not apply "when a prosecutor performs the investigative functions normally performed by a detective or police officer." Buckley, at 273. Just like the prosecutor's *post-arrest* press conference inflammatory remarks in Buckley, Petty's pressuring of Patricia to make inflammatory declarations in civil proceedings on child placement have no immunity. Petty threatened Patricia with calling CPS to put the children foster care to coerce Patricia to Petty's agenda. CP 585; 412. Petty recognized the limitations of her immunity testifying: "it's not my job to investigate, it's the police officer's job to investigate." CP 1002:17-24.

The City spuriously attempts to distinguish Buckley v. Fitzsimmons by

contrasting the Buckley facts to Petty's prosecution of Kingrey's false arrest. See City's Brief, pages 32-37. But the City's analysis is inapposite because Appellants seek to hold Petty liable only for her non-advocacy activities, *not* her prosecution of the assault charge. Petty's non-advocacy acts were investigative in nature; were purposed to affect child placement decisions and/or to create an untruthful factual context for *new* criminal charges; and were not integral to the judicial process of prosecuting the assault charge.⁵

Demery v. Kupperman, 735 F.2d 1139, 1144 (9th Circ. 1984), on which the City relies, is inapposite. In Demery, a deputy attorney general's interview of "certain investigative agents" who investigated alleged misconduct on the State's behalf enjoyed absolute immunity. In contrast, Petty did not interview any police officers but conducted the investigation herself. The Demery Court's *dicta* that absolute immunity could attach to "investigative" acts was rejected by the US Supreme Court holding "that absolute immunity is not that expansive" and the proper analysis is "whether the prosecutor's actions are closely associated with the judicial process." Burns v. Reed at 495-496.⁶

Similarly Schmitt v. Langenour, 162 Wn. App 397, 256 P.3d 1235 (2011) is inapposite. Unlike Petty, the Schmitt prosecutor had absolute immunity because a police officer, not the prosecutor, interviewed a witness.

⁵ See Opening Brief, III. G & P. These non-advocacy activities include: i) interrogating Patricia as to *new* possible criminal allegations against Fearghal including alleged no-contact order violations; ii) deputizing Patricia as her proxy to gather investigative information on any possible crimes; iii) pressuring Patricia to falsify evidence and manipulate facts out of context to support *new* criminal allegations; iv) inducing Patricia to submit false declarations in the civil divorce proceedings so as to affect child placement; and v) manipulating Patricia to give false testimony during Patricia's 9/28/09 deposition by promising Patricia free legal representation to get custody of Conor and Cormac.

⁶ In Milstein v. Cooley, 257 F.3d 1004, 1009 n.5 (9th Circ. 2001), the Ninth Circuit acknowledges the U.S. Supreme Court's rejection of this *dicta* in Demery.

3. *Genuine issues of material fact evidence Petty's acts are not shielded by absolute immunity. Any immunity analysis must construe all facts and inferences in favor of Appellants and against the City.*

Only when no genuine issues of material fact exist can absolute immunity be established on summary judgment as a matter of law. See Hannum v. Friedt, 88 Wn. App, 881, 886, 947, P.2d 760 (1997). The City's argument as to absolute immunity is premised upon applying immunity doctrine to only the *disputed* facts and inferences favorable to the City and unfavorable to Appellants. Thus, their analysis is flawed.

As the moving party, it is the City's burden to show the absence of genuine issues of material fact and that summary judgment is proper as a matter of law. Atherton Condo. v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990). The City is held to a strict standard; any doubts as to the existence of a genuine issue of material fact are resolved against the City. Id. For an immunity analysis, the court accepts the allegations of the complaint as true. Staats v. Brown, 139 Wn.2d 757, 772 991 P.2d 615 (2000).

The City rests its absolute immunity defense on the credibility of Patricia's testimony. But "credibility determinations are solely for the trier of fact [and] cannot be reviewed on appeal." Morse v. Antonellis, 149 Wash.2d 572, 574, 70 P.3d 125 (2003). If there is a genuine issue of credibility, summary judgment should be denied. Rounds v. Union Bankers Ins. Co., 22 Wn. App. 613, 617, 590 P.2d 1286 (1979).

In the dissolution matter, Patricia stipulated to Findings of Fact admitting that the original assault allegation was false, and that the three alleged no-contact order violations and witness tampering allegation she made were false. CP 410; CP 412, ¶2.21, ¶2.22. Patricia participated in

drafting the Stipulated Findings and agreed to them of her own free will to resolve the child custody dispute. CP 216, ¶1. CP 595-6.

Patricia testified that Petty coached her to on what to say in the 9/28/09 deposition during bathroom breaks; and Petty walked Patricia “step by step” on what to say in deposition as a pretext to seek a protection order against Fearghal to be used in family court so as to effect a change to child custody, all to be done by Petty as Patricia’s free legal counsel. Opening Brief, ¶P, pgs 29-30. Patricia testified that this plan was similar to Petty’s prior instructions to Patricia in 2005; and as a result Patricia’s 9/28/09 deposition testimony “lacked integrity and was not rooted in fact.” Id; CP 742-743. *Petty asserted attorney-client privilege, not absolute immunity,* to refuse answering questions about her conversations with Patricia. CP 801-803. Petty corroborated Patricia’s testimony that she offered to represent Patricia for free knowing that Patricia did not have custody of her children. CP 802. CP 804. Viewing these facts in the light most favorable to Appellants, Petty suborned Patricia’s perjury in her 9/28/09 deposition. This is significant because the “facts” the City relies upon as a basis for absolute immunity are sourced from Patricia’s 9/28/09 deposition testimony that Patricia corrected. See III.F *infra*.

Petty directed Patricia to get a civil protection order precluding Fearghal from seeing Conor, which Patricia did on 7/28/2005. CP 412, CP 1444. Patricia testified that Petty interrogated her as to any evidence of new possible crimes other than the alleged misdemeanor assault, (“what else can you come up with?”); directed her to gather information such as going to Bally’s Fitness to get their time records, (“we need to get as much on this guy as possible”); directed her to report facts out of context so they would

be construed differently; CP 616-617; and coached her to “blacken Fearghal in the declarations” submitted to family court - all because Petty “wanted to see Patricia prevail in the family matter” so much so that “it got personal with her.” Opening Brief, ¶ G, pgs 18-21. CP 411-2, ¶2.20.

On 1/17/06, the family court entered a temporary no-contact order ex-parte that was extended for two weeks so that Fearghal could have time to respond. CP 1456, CP 1458. At a contested hearing on 2/1/06, Fearghal’s contact with Conor was terminated; and the court order to this effect was entered on 2/15/06. CP 1460. Billing records of Patricia’s divorce attorney, Ms. Miles, evidence multiple conversations between Miles and Petty in preparation for the 2/1/06 hearing. (on 1/27/07, 3.6 hours; 1/30/06, 7.1 hours including writing declarations). CP 977-8. This corroborates Patricia’s testimony that Petty and Miles, “strategized together”, exchanging information that “they used together” to “collaborate on the child custody issue” so much so that Petty’s prosecution of the misdemeanor assault and the child custody dispute “became interwoven”. CP 525, CP 614, CP 746. Petty acted outside her advocacy scope by collaborating with Miles and directing Patricia to be untruthful so as to influence a court placement decision; after which the family court terminated Fearghal’s contact with *Conor*.

As to the alleged no-contact order violations, Petty asked Patricia “all sorts of questions” as to whether Fearghal had any contact with the children, *Petty instructed Patricia to go back to Bally’s Fitness Club and “get the records and show them to her”*, after which Petty coached Patricia on what to say to the police, even directing Patricia on the specific precinct to report the alleged NCO violations. CP 746,#100; CP 754, #220. This was

investigative fact-finding and reporting.

Petty instructed Patricia to report an untruthful context to support a new witness tampering charge, CP 751. When asked if Petty directed her to make up allegations, Patricia testified she had conversations with Petty “in that regard, in that manner.” CP 613:7-10. Petty asked her to exaggerate, CP 613:14. Petty actions were investigative because she was not the assigned prosecutor this charge. A County prosecutor later dismissed the charge.

In sum, *prior to any involvement* by Langston and Boswell, Petty directed Patricia, controlled investigative activities, and controlled information flow to Langston and Boswell so as to manipulate these officers into finding probable cause for *new* crimes. Officer Langston was not so easily duped. Langston *did not find any probable cause or make any arrest*, and instead forwarded his report back to Petty, the originator.⁷ Langston had a *mandatory* duty to arrest if he had probable cause to believe Patricia’s allegations of no-contact order violations, RCW 10.99.055. Despite Langston’s determination of no probable cause, Petty relied on her own prior investigation, *not Langston’s*, to charge Fearghal with violating the no-contact order, CP 337. Petty’s investigative activities were not conducted *post-arrest* after a probable cause determination by Langston; instead, Petty acted in the role of a policeman to determine probable cause herself.⁸ This is important because “a prosecutor neither is, nor should consider himself to be, an advocate before he or she has probable cause to have anyone arrested.” Buckley at 274.⁹

⁷ Langston noted in his report that Patricia planned to follow up directly with Petty; and that Petty had directed Patricia to get a civil restraining order, CP 75.

⁸ A different prosecutor dismissed the no-contact order violation charges on 10/4/06, CP 343.

⁹ “Of course, a determination of probable cause does not guarantee a prosecutor absolute immunity from liability for all actions taken afterwards. Even after that determination...a

Viewing all facts in the light most favorable to the Appellants, Petty directed Patricia's information gathering, fact-finding and reporting; Petty interrogated Patricia, and coached Patricia to contextually and untruthfully report *new* crimes to the police. These acts were not judicially tied to Petty's prosecution of the misdemeanor assault charge. Instead they were investigative in nature and not shielded by absolute immunity.

D. The “substantial factor” test was raised in the trial court and does not offend Tyner.

Appellants raised the “substantial factor” test before the trial court by arguing that cause-in-fact should be determined by considering the cumulative effect of all Respondents' breaches of duty rather than atomizing the degree of causation for each individual negligent act. Appendix B. Any issue tried by the parties' express or implied consent is treated as if was raised in the pleadings. CR 15(b)(2).

Simply put, this is a multiple causation action with multiple actors all who breached their statutory duties. “The ‘substantial factor’ test is generally applied in multiple causation cases. Mackay v. Acorn Custom Cabinetry, Inc., 127 Wn.2d 302, 310, 898 P.2d 284 (1995). The substantial factor test is the appropriate burden of proof where multiple actors might have caused the complainant's injury. Allison v. Hous. Auth. of Seattle, 118 Wn.2d 79, 93-94, 821 P.2d 34 (1991). A jury should be permitted to consider the cumulative effect of Respondents' multiple breaches of duties.

None of the cases cited by the Respondents analyze cause-in-fact in the context of multiple actors with legal liability for negligent investigation.

prosecutor may engage in 'police investigative work' that is entitled to only qualified immunity.” Buckley, at 273, n.5. See also Gilliam at 583. (“Neither police nor prosecutors enjoy immunity for investigative work merely because the conduct complained of occurs after charges are filed”).

Tyner is not a multiple causation case. In Tyner, proximate cause was analyzed in the context of a *single* actor, DSHS, who had legal liability. Tyner does not abandon “there are several tests for factual causation, the most common of which is the ‘but for’ test, although the ‘substantial factor’ test applies in some circumstances.” State v. McDonald, 90 Wn. App. 604, 612, 953 P.2d 470 (1998). For negligent investigation causation, the ‘but for’ standard is proper where there is a single actor or cause; while the ‘substantial factor’ standard is proper where there are multiple bad actors or causes. For this reason, the substantial factor test does not offend Tyner.

Negligent investigation is a statutory tort, not a common law tort.¹⁰ For actions rooted in public policy, our Supreme Court favors the “substantial factor” standard of cause-in-fact over the “but for” standard. See Wilmot v. Kaiser Aluminum & Chem. Corp., 118 Wn.2d 46, 71, 821 P.2d 18 (1991), (substantial factor test for retaliatory discharge benefits public policy); Allison, at 94, (a “but for” standard of causation would not further the Legislature’s purpose in enacting Washington’s Law Against Discrimination). Because the public policy mandate to protect the parent-child bond is no less important than the public policy to protect civilians from discrimination. the

¹⁰ For common law negligence claims, the substantial factor test is proper in three situations: (1) where either one of two causes would have produced identical harm, (2) where a similar, but not identical, result would have followed without the defendant’s act; and (3) where a defendant has made a proven but quite insignificant contribution to the result. Daugert v. Pappas, 104 Wn.2d 254, 262, 704 P.2d 600 (1985); Sharbono v. Universal Underwriters Ins. Co., 139 Wn. App. 383, 425, 161 P.3d 406 (2007). The cause-in fact issues here fit one or more of these criteria Either Kingrey’s or Dixon’s negligent investigations caused Fearghal and Cornac’s prolonged harmful separation; either Dixon’s, Paulson/Young’s or Petty’s negligent investigations caused Fearghal and Conor’s prolonged harmful separation. (Situation 1). Had Dixon, Farrell and Petty not been negligent, harmful placements would still have been caused by Kingrey’s and Paulson/Young’s negligence but it would not have been as prolonged. (Situation 2). Farrell clearly breached his duty to investigate but his breach arguably had a lesser or insignificant contribution to harmful placement as it occurred eighteen months, in December 2006, after Kingrey’s investigation. (Situation 3).

substantial factor test should apply in negligent investigation actions invoking public policy to protect the parent-child bond from unnecessary disruption.

Fabrique v. Choice Hotels Int'l, Inc., 144 Wn. App. 675, 684, 183 P.3d 1118 (2008) is inapposite because the Fabrique Court analyzed proximate cause in the context of a common law negligence tort, not in the context of a *statutory tort* derived from public policy as is the case here.

The County and State each had a statutory duty to coordinate their investigations. RCW 26.44.035(1). Thus, it would be illogical not to apply the substantial factor test when both the County and State have legal liability for the same harmful placement decisions, as is the case here. Applying the substantial factor test precludes the possibility of the County and State escaping liability by blaming each other for cause-in-fact. Such a result would be absurd and would be contrary to the statutory intent.¹¹

E. All claims against the City withstand summary judgment.

1. All evidence in the record is admissible against the City

The trial court denied the City's CR 54(b) motion to certify as final its orders on summary judgment and reconsideration thereof. CP 2070. Because these orders were not final, they were "subject to revision at any time" prior to entry of a final judgment. CR 54(b). The court did not enter a final appealable order until 5/9/14. CP 2072. Thus, the City's attempt to exclude evidence fails. At all times the City has been a party to this action with the right to object to evidence. It cannot object now on appeal. All the evidence in the Clerk's Papers is properly before this Court for its de novo review.

The trial court initially did not accept attorney Greg Price's declaration

¹¹ Notably, Judge Collier overturned Judge Nichols summary judgment rulings so that all evidence would be *cumulatively* considered on appeal. RP 263.

filed 5/21/10 (sub #126, CP 627-648) as it was untimely filed; but the court accepted it on reconsideration, (along with a second declaration, sub #131). In its order on reconsideration, the court struck out the proposed language seeking to strike both these declarations. CP 1100, ¶2.¹² Even if the trial court *had* struck these declarations, such a ruling would have been an abuse of discretion. See Keck v. Collins, 181 Wn. App. 67, 81, 325 P.3d 306 (2014), citing Folsom v. Burger King, 135 Wn.2d at 663, (“An appellate court cannot properly review a summary judgment order de novo without independently ‘examining all the evidence presented to the trial court’ on summary judgment.”) Untimely filed evidence is “on file” and is considered under the Court’s de novo review. Keck v. Collins, at 81-82; CR 56(c), RAP 9.12.

2. Claims against the City share common facts and were not abandoned.

Appellants did not abandon any claim against the City merely because they concentrated on claims that were the focus of the city’s motion. Berry v. Crown Cork & Seal Co., 103 Wn. App. 312, 318-321, 14 P.3d 789 (2000). Nor did Appellants abandon any claim against the City because Appellants presented evidence on summary judgment that supported each claim. See West v. Gregoire, 184 Wn. App. 164, 171, 336 P.3d 110, 113 (2014).

First, the City admits Appellants’ summary judgment brief presented facts and argument as to “negligent investigation, WLAD, outrage and malicious interference.” City’s Brief, pg 23.¹³ See CP 469-471. Second, Appellants’ responses concentrated on the negligent investigation claims and refuted the absolute immunity defense, which were the focus of the

¹² Judge Nichols stated he looked at these declarations. RP 66.

¹³ No claim for wrongdoing against Officer Langston was ever asserted. CP 694. Upon receipt of discovery, Fearghal did waive his claims against Boswell.

City's motion. Third, the Plaintiffs' supplemental briefing and declarations presented more common facts to support all these claims. CP 726-812.

Common facts as to Appellants' claims against the City for negligent investigation, malicious interference, outrage, WLAD and 10.99 negligence are in the record on appeal. Thus, no claims were waived as the City wrongly contends.¹⁴ See Keck v. Collins, 181 Wn. App at 81, (“[To] construe all evidence and reasonable inferences in the light most favorable to the nonmoving party, the appellate court evaluates anew all evidence available to the trial court for potential consideration on summary judgment.”)

3. Negligent Investigation

The City concedes that RCW 26.44.050 “obligated Petty to ensure that any allegation that Fearghal violated the [no-contact] order was investigated”. City’s Brief, pg 40. Petty is legally liable for negligent investigation because she stepped outside her advocacy role to investigate these alleged no-contact order violations prior to any police investigation that established probable cause. See RCW 26.44.020(14), (a law enforcement agency includes the prosecuting attorney); Rodriguez, at 444, (the “duty [to investigate] derives from the paramount importance that is placed on the welfare of the child.”); Gilliam at 585, (“when prosecutors perform investigative functions they have same the liability as police officers for negligent investigation”).

Petty’s investigations prolonged Fearghal’s separation from his children. Following her investigation of alleged no-contact order violations, the no-contact order was extended until 12/08/10; CP 340-1. Following Petty’s investigation of alleged witness tampering, a no-contact order was

¹⁴ The State also agrees to issue adjudication based on common facts. State’s Brief, p 27.

entered on 2/21/06, which did not expire until 2/21/08. CP 256-257. Whether Petty's investigative acts were the cause-in-fact of Fearghal's prolonged separation from his children is a question of fact for the jury.

RCW 26.44.280 and RCW 4.24.595, enacted in 2012, provide statutory immunity for "emergent placement decisions." The City requests retroactive application of these statutes as a basis to escape negligent investigation liability. This is moot because no "emergent placements" took place in this case and non-emergent placement decisions are not immunized. See Reply Brief of Conor and Cormac, ¶A.15, pg 36-37.

4. Malicious Interference with Parent-Child Relationship

This claim shares common facts with negligent investigation. Appellants must show "an intention on the part of the third person that such wrongful interference results in a loss of affection or family association", i.e. malice. Waller v. State, 64 Wash. App. 318, 338, 824 P.2d 1225 (1992). Malice is a factual issue, not resolvable on summary judgment. Id. at 339.

Patricia's testimony evidences Petty's malice towards Fearghal: "it was personal with her"; Petty coached Patricia to blacken Fearghal in civil declarations; Petty asked Patricia "to get as much on this guy as we possibly can"; Petty directed Patricia to manipulate facts out of context because "what mattered...was to see what else we could get on Fearghal [] whether it was exactly true or not." CP 616-17. Opening Brief, ¶G, pg 19. Petty's malice is further evidenced when Petty repeated this conduct during breaks to Patricia's 9/28/09 deposition, promising Patricia free legal representation to file new protection orders to effect child placement decisions adverse to Fearghal in return for Patricia's false deposition testimony. Petty investigated new alleged

DV crimes against Fearghal knowing that any DV conviction would result in Fearghal's deportation as a non-US citizen, and would cause Fearghal's permanent separation from his children. CP 1790-2, ¶2, ¶6. CP 411-2.

5. *Fearghal's gender discrimination and RCW 10.99/26.50 negligence claims withstand summary judgment. (Taylor and Petty)*

The claims regarding Officer Taylor were preserved for this Court's de novo review because no final summary judgment order was entered until 5/9/14 and all orders in favor of the City remained "subject to revision at any time" prior to entry of final judgment on 5/9/14. CR 54(b). Thus, all evidence submitted and arguments made prior to final summary judgment order are preserved for this Court's de novo review. CR 54(b).

Taylor's police report evidences Fearghal claims. Patricia disturbed Fearghal's peace at the hospital in violation the DVRO; Taylor determined Patricia was in violation of the DVRO and RCW 26.50.110. CP 63-65. Taylor had a *mandatory* duty to arrest Patricia because he had probable cause to believe she violated the DVRO. RCW 10.99.055; RCW 26.50.110(1)(a)(i); RCW 10.31.100(2). The City excuses Taylor's negligence because Patricia obtained an after-the-fact ex-parte order allowing her to be at the hospital. CP 355. But the trial court held Patricia in contempt for defrauding the court to obtain that after-the-fact ex-parte order and for violating the DVRO; CP 642-3; and the trial court then vacated the fraudently obtained ex-parte order. CP 649. Taylor violated his mandatory duty to enforce the DVRO pursuant to the domestic violence statutes. A reasonable jury could find so.

The statutory intent of RCW 10.99 is to ensure domestic violence laws are enforced to remedy "previous societal attitudes...reflected in policies and

practices of law enforcement agencies and prosecutors.” RCW 10.99.010. The statute implies liability for all breaches of duties, including Petty’s non-advocacy act of failing to provide notice pursuant RCW 10.99.060. The City fails to explain why this statute exempts Petty from civil liability.

Fearghal’s gender discrimination claim and negligence claim for non-enforcement of domestic violence laws arise from the following fact sets: (1) Taylor discriminately failed to execute his statutory duties to protect Fearghal based on gender; and (2) Petty discriminately failed to give notice to Fearghal pursuant to RCW 10.99.060 because of his gender; and (3) Petty’s torts arose from her discriminatory gender-biased motives. Patricia attests to Petty’s gender-based discrimination. CP 755-6,#235. Because evidence supporting these facts is in the record, these claims were not waived.

F. The trial court’s exclusion of Patricia’s correction pages as corrected deposition testimony was an abuse of discretion.

The trial court accepted Patricia’s correction pages to her deposition into evidence as a *declaration*, but rejected them as *corrected deposition testimony*. CP 1096-8. The City now states “whether the court accepts or rejects her ‘correction sheets’ does not matter for purposes of the City”. City’s Brief, pg 45, ¶E. This issue is very important because if Patricia’s correction pages were properly admitted, then many of the facts Respondents relied on to prevail on summary judgment would not actually exist.

Evidentiary rulings made in conjunction with summary judgment are reviewed de novo. Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). Recently, the Supreme Court held that the exclusion of untimely filed evidence was an abuse of discretion because the trial court

failed to consider the three factors set forth in Burnet v. Spokane Ambulance, 131 Wn.2d 484, 933 P.2d 1036 (1977): whether a lesser sanction would probably suffice, whether the violation was willful or deliberate, and whether the violation substantially prejudiced the opposing party. Keck v. Collins, No.90357-3 (En Banc. Sept. 24, 2015), citing Jones v. City of Seattle, 179 Wn.2d 322, 338, 314 P.3d 380 (2013). Appendix C. Here, the trial court abused its discretion by failing to consider the three Burnet factors before it excluded Patricia's correction sheets as untimely.

Patricia's correction sheets were stricken as corrected testimony based upon the prejudicially taken deposition of Robin Kraemer. Factual disputes exist as to whether Patricia's correction sheets were untimely filed. *infra*.

First, it is disputed that Patricia waived signature. Patricia's deposition occurred over five different days. The "notice of filing deposition" does not state that Patricia was ill or refused to sign her deposition. See CP 894; CR 30(e). Nor did Appellants stipulate to any waiver of Patricia's signature as required by CR 30(e). Patricia also reserved signature on her depositions.¹⁵

Second Patricia's 30-day timeline under CR 30(e) was never actually triggered because Schmitt & Lehmann ("S&L"), the court reporting firm, failed to comply with CR 30(e) and provide Patricia with transcript copies. CR 30(e). CP 894; CP 892. On April 7, 2010, S&L sent electronic copies of the transcripts ("E-transcripts") to the attorneys, but not to Patricia. CP 894.

Third, Patricia is adamant she submitted all 18 pages of her correction

¹⁵ The first "notice of filing deposition" evidences Patricia reserved her signature. CP 892. Ms. Cheryl Vorhees was the court reporter for Patricia's deposition. CP 448-9. But someone named "Jenny", not Ms. Vorhees, filed a "notice of filing deposition" incorrectly stating Patricia's signature had been waived. CP 894. Patricia did not change her mind to waive her signature. CP 1046, CP 1050-1066. CP 1067-70.

sheets by personal delivery to S&L on 5/7/10.¹⁶ CP 1067-1070. This was within 30 days of S&L forwarding the E-transcripts to the attorneys. Patricia received all 744 pages of the E-transcripts from Appellants' counsel, Mr. Boothe.¹⁷ CP 1068. The notion that Patricia submitted, signed and swore to a single correction page designated "p 18 of 18", without submitting the preceding 17 pages designated #1-17 of 18 of the full 18 page-set is far-fetched.¹⁸ The sworn correction sheet serves no purpose as a standalone page because it does not independently list any corrections itself.

Fourth, Patricia testified that her 9/28/09 deposition testimony "lacks integrity and is not rooted in fact" due to Petty's improper interference during deposition breaks. CP 742, #35. It is unjust for the City to benefit from Petty's improper, arguably criminal, influence. See RCW 9A.72.120(1)(a).

Fifth, the City does not dispute that it prejudicially obtained Kramer's deposition testimony in complete disregard to CR 31.¹⁹ See City's Brief, pgs 45-47, ¶E; Appellants' Objection. CP 1035-1039.

Sixth, State's counsel, Ms. Anderson directly contradicted Kramer's

¹⁶ Patricia designated 17 correction sheets sequentially (#1-17 of 18) in typeface, and designated in her own handwriting as "p 18 of 18" a blank to-be-notarized signature page that she had previously obtained in her 3/3/10 deposition. CP 740-757. On 5/17/10, Patricia went to S&L's office, submitted all 17 typed correction sheets together with the 18th signature page, and signed the 18th "sworn" page witnessed by Kraemer. CP 1068. Kraemer told Patricia everything was in order, CP 1069 ¶7. Kramer notarized the signature page as having being subscribed and sworn to by Patricia on 5/7/10 as "p 18 of 18". CP 757.

¹⁷ Perturbed that no-one provided her with *hardcopies* of the transcripts, Patricia emailed the City requesting hardcopies on 5/3/10, four days prior to submitting her corrections. CP 1076.

¹⁸ Kraemer testified that if Patricia had mailed her correction sheets, S&L would have a cover letter on file, but S&L had no such cover letter on file. CP 907.

¹⁹ The City failed to designate an officer to take Kramer's testimony and accept written questions from Appellants to circumvent CR 31 that provided 15 days for Appellants to submit cross-questions prior to an *officer* taking Kramer's testimony. Appellants' Objection. CP 1035-1039. Prior to expiration of the 15 days, the City filed Kramer's prejudicially taken deposition to support a motion to suppress Patricia's correction sheets; a motion heard at the same time on 7/30/15 as its summary judgment motion.

testimony, suggesting that S&L made mistakes. CP 1038-9, ¶¶ CP 814.

For all these reasons, Patricia's sworn correction sheets should stand as corrections to her deposition testimony. See Appellants' Memorandum and Objection, CP 1032-1042. The court abused its discretion when it struck Patricia's deposition corrections because the purpose of summary judgment "is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists." Keck v. Collins, No.90357-3 (Sept. 24, 2015), citing Preston v. Duncan, 55 Wn.2d 678, 683, 349 P.2d 605 (1960).

G. The County is not entitled to qualified immunity.

"Local government entities are not entitled to the qualified immunity available to their officials." Robinson v. Seattle, 119 Wn.2d 34, 64, 830 P.2d 318 (1992). See also Savage v. State, 127 Wn.2d 434, 442, 899 P.2d 1270 (1995), (denial of a parole officer's qualified immunity to his employer; Babcock v. State, 116 Wn.2d 596, 619, 809 P.2d 143 (1991), ("DSHS cannot claim the qualified immunity of its caseworkers"); Mission Springs, Inc. v. City of Spokane, 134 Wn.2d 947, 968, 954 P.2d 250 (1998); ("Municipalities enjoy no qualified immunity from suit."). In any event, the County's deputies do not enjoy qualified immunity for negligent investigation.²⁰

²⁰ Law officers' liability for negligent investigation is governed by the same negligence standard that applies to DSHS. Rodriguez, at 445-446. Law officers only have qualified immunity for *emergency* placement decisions, inapplicable here. RCW 26.44.050. To obtain qualified immunity, a police officer must (1) carry out a statutory duty, (2) according to procedures dictated by statute and superiors, and (3) act reasonably. Guffey v. State, 103 Wn.2d 144, 152, 690 P.2d 1163 (1984). For purposes of qualified immunity, the court accepts the allegations of the complaint as true. Staats v. Brown, 139 Wn.2d 757, 772 991 P.2d 615 (2000). The alleged facts along with material evidence show that the deputies fail to satisfy the three conditions in Guffey because Kingrey, Paulson, Young and Farrell

H. Fearghal's involuntary separation from his children constitutes a "harmful placement" that is actionable under RCW 26.44.

Protecting the parent-child bond from unnecessary disruption is of paramount importance. Rodriguez v. Perez, 99 Wn. App. 439, 444, 994 P.2d 874 (2000). RCW 26.44.010. RCW 26.44.100(1). The purpose of RCW 26.44 includes protecting children "from *needless separation* from their families", parents from "*unwarranted separation* from their children" and protecting the "parent-child relationship...from being invaded." Tyner v. State Dep't of Soc. & Health Serv., 141 Wn.2d 68, 79, 1 P.3d 1148 (2000).

In M.W. v. DSHS, 149 Wn.2d 589, 70 P.3d 954 (2003), the Supreme Court expanded the scope of implied injury under RCW 26.44 from the scope stated in Tyner to the broader "*leads to a harmful placement decision*" scope. M.W., at 591, 602. Thus, M.W. affirms that RCW 26.44 implies a remedy for actions "lead[ing] to a harmful placement decision", but not for common law torts such as DSHS's traumatic physical examination of a child.

"The language [in M.W.] does not limit the scope of the entire statute... Rather, it can fairly be read to address only the issues presented in M.W." Lewis v. Whatcom County, 136 Wn. App. 450, 458, 149 P.3d 686 (2006)."

"Harmful placement decisions" are not limited to affirmative placement decisions. Rather, legal liability accrues from any negligent investigation that "*leads to* a harmful placement decision" even when the actual placement decision was made by a court. M.W. at 591. Tyner, at 86. A negligent investigation action does not require a government agency to affirmatively make a placement decision. See Lewis v. Whatcom, 136 Wn. App. at 458; Yonker v. DSHS, 85 Wn. App. 71, 930 P.2d 958 (1997).

A parent who *voluntarily* removes her children from her home cannot

either; i) failed to carry out statutory duties under RCW 26.44; or ii) did not act reasonably in executing their statutory investigative and reporting duties.

legally assert a harmful placement injury. Roberson v. Perez, 156 Wn.2d 33, 123 P.3d 844 (2005). But Roberson is inapposite here because Appellants' nearly two year separation, was entirely *involuntary*. Patricia's voluntary acts when she had custody of the children cannot be imputed to the Appellants.

It is undisputed that various court-issued no-contact orders separated Fearghal from his children for almost two years. Respondents' contention that these court orders cannot constitute harmful placement decisions was rejected in Tyner. Id. at 86. Appellants' involuntary separation by itself is the injury or harmful placement for which RCW 26.44 provides a remedy.

I. The legislative purpose of RCW 26.44 establishes legal causation for Respondents' negligent investigations and breaches of duty.

1. Respondents' liability arises from their abrogation of duties owed under RCW 26.44, not from non-participation in court proceedings.

DSHS' and law enforcement's duty "to investigate is statutorily mandated and must be completed regardless of whether its results may ultimately be presented to a court of law." Tyner, at 83. Legal causation "arises not from [their] use of the Court to further its investigation but from [their] failure to adequately investigate" because investigative duties "center on conduct outside the judicial arena" and no Respondents "were enforcing a court order or acting as an arm of the court." Tyner, at 83.

Appellants do not contend that DSHS has affirmative duties to seek out court proceedings that may affect child placement. Rather, DSHS' legal liability arises from its breaches of statutory duties owed to Fearghal. These duties include those listed in Appendix A; e.g. the duty to notify Fearghal of its investigative findings within the timeframe established by DSHS (60 days in 2005) that is not extended longer than 90 days. These duties exist to

ensure that parents, like Fearghal, are not unnecessarily separated from their children; RCW 26.44.100(1); and because it is foreseeable that DSHS's investigative information will often end up in the hands of a judge.²¹

DSHS' duty to issue investigative findings within 45-90 days is rooted in the Legislature's foreseeability that parents often become parties to court proceedings that result in judicial placement decisions. DSHS' duty to timely provide their investigative findings enables parents to supply, argue or rebut those findings to courts making placement decisions. *But if DSHS deprives parents of material information pertaining to child abuse investigations, it necessarily deprives courts of the same information.* Hence, legal causation exists because DSHS abrogated its duties owed to Fearghal, regardless of DSHS' non-participation in court proceedings.

2. A negligent investigation claim is not limited to harmful placement decisions arising only from dependency proceedings.

Washington courts do not interpret the statute so narrowly so as to limit negligent investigation liability to placement decisions made in dependency proceedings. See Tyner, at 83 (liability arises from the failure to adequately investigate, not court proceedings); Rodriguez v. Perez, 99 Wn. App. 439, (negligent investigation claims are cognizable against law officers law officers regardless of any dependency proceedings). The legislative purpose to protect the parent-child bond does not discriminate by court forum. RCW 26.44.010. It is irrelevant to legal causation whether a placement decision flows from a dependency, criminal, protection order, or a dissolution proceeding.

²¹ "As the Legislature has recognized, a parent...of a child is within the class of persons who are foreseeably harmed by a negligent investigation into allegations of child abuse." Tyner v. DSHS, 92 Wn. App. 504, 512, 963 P.2d 215 (1998).

3. Commencement of legal causation for DSHS

DSHS' liability commenced on June 14, 2005 when it failed to interview the children within the required 10 days from the date of intake, which was June 4, 2005.²² CPS Guide, ¶2331.4.b. Dixon's breaches of duty included his failure to notify Fearghal of its investigation at the earliest opportunity; to notify Fearghal of any child interviews; to contact Fearghal to request an interview; and to notify Fearghal of investigative findings within 60-90 days. See Appendix A. In sum, Dixon shunned the opportunity to discover that Patricia's allegations were false. In failing his duties, Dixon prolonged Fearghal's separation from his children by depriving courts that made placement decisions of material information.

4. No exemption from legal liability exists for negligent intake decisions.

RCW 26.44.030(11) is not a license for DSHS to escape legal liability for negligent investigation by declining to accept reports of possible abuse for investigation. Even so, RCW 26.44.030(11)(a) is not applicable here because DSHS did not screen Fearghal's reports of child abuse/neglect for the "family assessment" option. CPS' duty is to screen out *only* those referrals that don't meet the definitions of abuse/neglect. WAC 388-15-017(2),(3),(5). Whether cause-in-fact exists for negligence or reckless disregard for CPS' screening decisions is a question of fact for a jury, not one of legal causation.

5. Legal causation exists for all Clark County's negligent investigations

Legal causation rests on whether a defendant owes a plaintiff a duty. Schooley v. Pinch's Deli Market, Inc., 134 Wn.2d 468, 478, 951 P.2d 749

²² Nor can DSHS disavow legal causation for Appellants' harmful separation occurring on or after 8/3/2005 because DSHS's duty was to issue findings on the *earlier* of 60 days (DSHS rule in 2005) or 90 days (the statutory maximum) from 6/4/2005.

(1998). Because possible child abuse was reported to Kingrey, Paulson, Young and Farrell, each of them had a duty to investigate non-negligently, and thus legal causation exists for each of their negligent investigations.

An officer's duty to investigate is triggered upon receipt of a report concerning the *possible occurrence* of abuse/neglect, not a specific report of verified actual abuse. Yonker v. DSHS, at 80, citing RCW 26.44.050.

This duty was triggered when Kingrey investigated the assault allegation. Further, Kingrey testified he arrested Fearghal based on his foreseeability that his arrest would affect child placement. Kingrey also told Patricia in advance that a no-contact order would be issued. CP 1225.

On 11/1/2006, Fearghal called law enforcement *twice* reporting concerns of possible neglect/abuse pertaining to the safety and welfare of his children. Paulson and Young responded triggering legal causation.

On 12/7/2006, Fearghal reported concerns about child endangerment to Deputy Farrell showing Farrell a chain lock installed on the outside of Cormac's bedroom door. Legal causation exists because Farrell's duty to investigate is not abrogated by Farrell's decision to do nothing.

J. Reasonable minds could and did differ as to the existence of cause-in-fact for negligent investigation.

Notably, Judge Nichols denied the County summary judgment on the negligent investigation claims stating that "issues of fact" existed as to whether harmful placement decisions were caused by a "biased or faulty investigation", citing Roberson v. Perez, at 45. CP 1270. Thus, Judge Nichols affirmed that reasonable minds could differ as to the existence of cause-in-fact for negligent investigation.

Respondents rely heavily on Patricia's 9/28/2009 deposition testimony

that Patricia states “lacked integrity and was not rooted in fact” due to Ms. Petty’s interference and inducements. CP 742-743, #35. Recognizing that credibility issues exist, Judge Nichols denied summary judgment ruling “that the court does not engage in weighing the credibility of the witnesses at this stage of the proceedings.” CP 1269. The credibility determinations in this case belong to a jury and preclude summary judgment.

K. A jury could determine that DSHS’ negligent investigation deprived courts of information material to court placement decisions.

1. The State cannot prove the absence of facts that a jury could determine as information material to court placement decisions.

A court’s no-contact orders will not break the causal chain where the court has been deprived of material information and “the question of materiality is a question of cause-in-fact...for the jury.” Tyner, at 86. On summary judgment, the State must prove the absence of any facts that a jury could find to be material. Atherton Condo. v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990). They fail to meet this burden.

“Negligent failure to discover material information” in child abuse investigations deprives courts of material information and subjects the State to liability “even after adversarial proceedings have begun.” Tyner at 83. DSHS failed to interview witnesses; and failed to issue non-negligent investigative findings and mandated risk assessments within 60-90 days. A jury could find that these failures deprived Fearghal and the courts of material information. To divest a jury of the cause-in-fact question of materiality would reward DSHS for its dereliction of duty, make a mockery of RCW 26.44.030(12)(a), and create an “undesirable incentive for the State” to delay its investigations so as to avoid legal liability. See Tyner at 83.

If an “unfounded” finding is material as held in Tyner; then a jury could equally find that an “inconclusive” finding is also material; and that courts were deprived of this material information because DSHS failed to make its “inconclusive” finding within 60-90 days (and not until 10/5/06, more that 16 months after the 60 day deadline applicable in 2005).

Failure to interview witnesses deprives a court of material information. Tyner, at 87. Dixon’s failure to interview Rebecca Hill deprived a court of material information because (1) it would have been clear that Ms. Hill did not interview Conor;²³ and (2) after DSHS learned that Hill’s medical report “contradicted [the] cause of the alleged injury it changed its findings to “inconclusive”; State’s Reply, pg 9. Dixon’s failure to interview Conor deprived the court of material information because an interview would have uncovered that Patricia’s allegations were false.²⁴ Dixon failure to interview Fearghal also deprived his DSHS’s investigation of material information.

Other facts include: i) Patricia told Dixon she did not witness Fearghal assault Cormac because “her back was turned”; CP 1818, p32; ii) Patricia was abusing narcotics and was high at the time of the alleged incident; iii) Patricia was suffering from delusions and taking psychotropic medications; iv) Dixon was under special supervisory review for fabricating reports. A jury could find that courts were deprived of material information because DSHS failed to make this information available within its 60 day investigative deadline.

²³ Ms. Hill’s medical notes evidence Conor was not present when she examined Cormac. CP 2021-2. Despite this, DSHS records state Hill met with Conor, that Conor reported “someone called the police” and his “father was arrested”. CP 1370, CP 1995. But Conor had no such knowledge because Patricia told Conor that Fearghal was on a business trip. CP 1781, ¶8.

²⁴ Dixon’s failure to interview Conor is evidenced by DSHS’ Family Face Sheet record, school records, Conor’s testimony, and more.

2. DSHS cannot abrogate its duties to the Courts or to Fearghal.

The State's contention that it should be exempted from legal liability because Fearghal could have presented material information to the courts is both speculative and misplaced. DSHS, not Fearghal, is vested with the duty to investigate child abuse referrals. RCW 26.44.050.

In Petcu v. State, 121 Wn. App. 36, 86 P.3d 1234 (2004), the Court declined to exclude information that Petcu presented to the dependency court. Id. at 58. But that is not the issue here. The State misreads Petcu, which is inapposite and factually distinguishable. DSHS and Fearghal were not adversaries in a dependency proceeding, nor is Fearghal asking to exclude information he presented to the lower courts.

"There is little question that courts rely heavily on the judgment of CPS caseworkers." Tyner at 87. Thus, courts assign greater credibility to the independent investigative findings of DSHS than the self-advocacy of a parent. Unlike DSHS, Fearghal could not issue *independent* investigative findings of 'inconclusive'; nor could he arrange interviews of the children due to no-contact orders. The State cannot evade legal liability by attempting to assign its investigative duties under RCW 26.44 to Fearghal.

3. Depriving criminal courts of material information does not shed liability.

Tyner does not distinguish between subsequent civil and criminal courts and even relied on two criminal cases for that proposition. See Tyner at 84-86, citing Hertog v. City of Seattle, 138 Wn.2d 265, 979 P.2d 400 (1999) and Bishop v. Miche, 137 Wn.2d 518, 973 P.2d 465 (1999).

The State cites Gausik v. Abbey, 126 Wn. App, 868, 107 P.3d 98 (2005), Cunningham v. City of Wenatchee, 214 F.Supp.2d 1103, 1112-1113

(E.D.Wash.2002) and In re Scott County, 672 F. Supp. 1152, 1166 (D. Minn. 1987) to contend that DSHS cannot proximately cause harmful placement decisions that occur in criminal proceedings. But in each of these cases, legal causation was not precluded; instead the plaintiffs were unable to provide sufficient evidence to support factual causation.

L. A jury could determine that the County's negligent investigations deprived courts of information material to court placement decisions.

1. The County cannot prove the absence of facts that a jury could determine as information material to court placement decisions.

A court's no-contact orders are not superseding causes when a defendant controls information flow to the court. Tyner, at 86-88, relying on Bender v. Seattle and Babcock v. State. Here, Kingrey controlled the flow of information from his investigation. The criminal, civil, and family courts relied on Kingrey's investigation without knowing that he shunned exculpatory evidence; and thus were deprived of material information.

In contrast, Deputy Zimmerman did not shun exculpatory evidence or find probable cause when faced with identical allegations and circumstances. Kingrey did no investigation at all; he failed to interview Conor or establish any corroborative evidence. Kingrey testified he paid no heed to Fearghal's report that Patricia was abusing narcotics. But in child abuse investigations, evidence of a parent's substance abuse *shall* be given great weight. RCW 26.44.195(2). A jury could find that courts were deprived of material facts when issuing no-contact orders due to Kingrey's sub-standard investigation.

The County's duty to investigate was triggered again on 11/1/2006 when Fearghal called 911 *twice* to report being "in fear of the safety of his children" asking "that deputies check on his children who were in the custody

of Patricia”. CP 1681, County’s Brief, pg 9. Yet, despite Paulson & Young’s knowledge that Conor was so traumatized by events that he was throwing up, they failed to interview the children to determine their welfare. Thus, they failed to discover that Patricia was screaming at Conor threatening to get him thrown in jail if he didn’t say “her truth”. CP 1681, 1780. Patricia brought Conor to the court-appointed evaluator the next day, again threatening Conor that the police would take him to jail if he did not say “her truth”. The family court then terminated Fearghal’s contact with Conor until the criminal matter was resolved. By not interviewing Conor, Paulson *negligently failed to discover* that Patricia was coercing Conor’s testimony; this deprived courts of material information. See Tyner at 83. A jury could find ‘but for’ Paulson’s and Young’s failure to adequately investigate, the family court would not have terminated Fearghal’s contact with Conor. This is especially true given Fearghal’s parenting time was increased and he became primary parent once the material facts regarding the children’s welfare were unearthed.

Deputy Farrell refused to investigate Fearghal’s report that he had seen a chain lock installed on Cormac’s bedroom door, which endangered Cormac. The young children were abandoned for extended time periods and had to forage for food; they endured emotional abuse; lack of supervision resulted in Cormac suffering dog bites to his face; and more. A jury could find that Farrell’s non-investigation and failure to discover information deprived Fearghal and the courts of material information. See Tyner at 83.

2. No court’s no-contact orders break the causal chain.

Bender applies equally to negligent investigation claims as it does to the false imprisonment and false arrest claims. See Tyner at 84. Kingrey

controlled the flow of information to Judge Schreiber. Judge Lewis also relied on Kingrey's investigative report. Because Fearghal entered a plea to the non-domestic violence charge of disorderly conduct, his plea was not the basis for Judge Lewis' post-conviction DV no-contact order. Instead Judge Lewis entered the DV no-contact order based on *findings* that Fearghal had been "*charged with [or] arrested*" for a domestic violence crime. CP 1699. Thus, Kingrey's arrest of Fearghal was the sole basis for the post-conviction DV no-contact order. Whether Kingrey's negligent investigation deprived Judge Schreiber and Judge Lewis of material facts is a cause-in fact question that belongs to a jury. See Tyner at 86.

Patricia leveraged Kingrey's arrest of Fearghal in the family court to obtain restraining orders preventing Fearghal from seeing his children. CP 1790. Patricia cited Kingrey's arrest of Fearghal in her declarations to lend credibility to her allegations:

"Mr. Kingrey arrested Mr. McCarthy for Domestic Violence and charged him for the assault on C.C.M. the night before. Mr. McCarthy is currently awaiting trial." CP 211.

The family court's order terminating Fearghal's contact with Conor states: "*After Respondent's criminal matters are resolved, the matter can be returned for review.*" CP 350. Thus, Kingrey's faulty investigation and arrest was given great weight by the family court in making placement decisions.

Whether the family court was deprived of material information due to negligent investigations by deputies Kingrey, Paulson, Young, and Farrell is a question of fact for the jury. Notably, upon learning certain facts that could have been uncovered by the County's deputies, the family court ordered Fearghal be primary parent with sole decision-making. CP 1790.

Therefore, a reasonable inference is that the County's negligent investigations deprived the family court of material information.

M. The negligence claim against the County withstands summary judgment because the County does not enjoy qualified immunity.

A mutual restraining order ("DVRO") subjected Patricia and Fearghal to mandatory arrest pursuant to RCW 26.09.060(7) and RCW 26.50. CP 1451. RCW 26.09.060(7) criminalizes violation of an order restraining a person from molesting or disturbing the peace of another party, or from going onto the grounds of or entering the home of the other party. State v. Turner, 118 Wn. App. 135, 141-143, 74 P.3d 1215 (2003). The "disturbing the peace" provision of the DVRO was a "restraint provision" pursuant to RCW 26.50.110(1)(a)(i) that prohibited the parties from i) acts or threats of violence, ii) stalking of ii) harassing contact with the other party.²⁵ Yet, the deputies' failed to enforce the DVRO; and failed to arrest Patricia despite her *intentional* and *repeated* harassment.

The deputies' treated all Fearghal's criminal complaints (e.g. check forgery) differently solely because Patricia was Fearghal's estranged spouse rather than a stranger. See RCW 10.99.010. The deputies had a mandatory duty to arrest Patricia. RCW 10.99.055; RCW 26.50.110; RCW 10.31.100(2). See, Donaldson v. City of Seattle, 65 Wn. App. 661, 670, 831 P.2d 1098 (1992), (a law officer with legal grounds to arrest pursuant to RCW 10.99 has no discretion and has a mandatory duty to make the arrest). An officer does not fulfill his statutory duty by violating it. Staats v. Brown, at 779.

The County does not dispute that Fearghal suffered injury caused by

²⁵ Domestic violence includes stalking. RCW 26.50.010(1). Stalking includes intentionally or repeatedly *harassing* another person. RCW 9A.46.110.

breaches of duties by Paulson, Young, Farrell and Zimmerman pursuant to RCW 10.99 and RCW 26.50, due to these officer's non-enforcement of the domestic violence statutes. Instead, the County asserts as its sole defense that it enjoys qualified immunity. But, qualified immunity does not exist for *non-enforcement* of the domestic violence laws, which is the issue here. Roy v. City of Everett, 118 Wn.2d 352, 357-359, 823 P.2d 1084 (1992). See Gurno v. LaConner, 65 Wn. App. 218, 228, 828 P.2d 49 (1992), ("The DVPA qualified immunity statute...grant[s] immunity *only* for conduct occurring in the course of an arrest or other on-the-scene action."); RCW 10.99.070. Nor does the County enjoy qualified immunity for its deputies actions. See ¶III.G, *supra*.

N. Fearghal's claims against DSHS for negligence and wanton misconduct withstand summary judgment.

Negligent investigation is not the sole cause of action under RCW 26.44. For example, an implied cause of action exists against a mandatory reporter who fails to report suspected abuse. Beggs v. DSHS, 171 Wn.2d 69, 77, 247 P.3d 421 (2011). A parent has the right to seek a remedy if any duty owed under RCW 26.44 is breached. Tyner at 80.

"Wanton misconduct is not negligence, since it involves intent rather than inadvertence." Adkisson v. Seattle, 42 Wn.2d 676, 687, 258 P.2d 461 (1953).²⁶ Separate facts support DSHS' wanton misconduct. Dixon knowingly fabricated reports including reports in this case. No later than February 2005, Dixon's superiors knew Dixon's history of fabricating reports and other misconduct "had a direct bearing on child

²⁶ The State doesn't dispute that wanton misconduct is a synonym for "reckless disregard" and was adjudicated on summary judgment. Any issue tried by the parties' express or implied consent is treated as if was raised in the pleadings. CR 15(b)(2).

safety”. Even so, they allowed Dixon to do casework on the McCarthy referral. Even after Dixon’s superiors terminated him from casework on 8/2/2005, Dixon’s superiors permitted him to issue findings and family risk assessments on the McCarthy referral in April 2006. Worse, even after Fearghal requested review of Dixon’s findings, Dixon’s superiors nonetheless affirmed Dixon’s investigation via letter dated 6/16/2006. The materiality of these facts as to cause-in-fact for wanton disregard (and the cause-in-fact boundaries for negligence) belongs to a jury.

Fearghal’s cause of action for reckless disregard (wanton misconduct) also holds DSHS liable for its negligent screening of Fearghal’s referrals. DSHS’ failures to notify Fearghal are also actionable. RCW 26.44.100.

O. The claims for negligent infliction of emotional distress (“NIED”) against the State, County and the City withstand summary judgment.

Fearghal’s NIED claims withstand summary judgment for three reasons: (1) Because emotional distress is a statutorily foreseeable harm under RCW 26.44, proof of objective symptomatology is not required; (2) even so, Fearghal presents evidence of objective symptomatology. (3) proof of objective symptomatology is a factual question for a jury.

When negligence occurs in a special relationship, proof of objective symptomatology is unnecessary because emotional distress is foreseeable. See Price v. State, 114 Wn. App. 65, 74, 57 P.3d 639 (2002), (NEID claim by parents using DSHS as an adoption agency does not require proof of objective symptomatology); Schmidt v. Coogan, 181 Wn.2d 661, 335 P.3d 424, 432 (2014), (NEID for attorney negligence does not require proof of objective symptomatology). Similarly, RCW 26.44.010 creates a special relationship between parents and investigating government agencies, whereby

emotional distress is a statutory foreseeable harm for negligent investigation and proof of objective symptomology is not required.

Nonetheless, Fearghal presents evidence of objective symptoms of emotional distress. To satisfy the objective symptom requirement, a plaintiff's emotional distress must be "*susceptible* to medical diagnosis" and the symptoms must "constitute a *diagnosable* emotional disorder." Hegel v. McMahon, 136 Wn.2d 122, 135, 960 P.2d 424 (1998). In other words, it is only required that the symptoms *could* support a diagnosis of an emotional disorder. No conclusive medical diagnosis is required. Dr. Boehnlien's medical testimony states that (1) he reviewed Fearghal's testimony as to his symptoms of emotional distress, ("nightmares, sleep disorders, intrusive memories, anxiety, fear, suicidal thoughts"); (2) these symptoms constitute "elements of multiple diagnosable mental health conditions"; and (3) these symptoms "are strong indicators" that Fearghal suffered "significant depression and/or anxiety for several years." CP 1786-7. Depression and anxiety are diagnosable emotional disorders with assigned DSM-IV codes.²⁷ Fearghal provided a medical opinion that he exhibited symptoms of anxiety and depression. All facts and reasonable inferences as to the existence of genuine issues of material fact are resolved in Fearghal's favor. Thus, Fearghal satisfies the objective symptom requirement.

Regardless, proof of objective symptomatology of emotional distress is a question of fact for a jury that is not resolvable on summary judgment. Strong v. Terrell, 147 Wn. App. 376, 387, 195 P.3d 977 (2008), citing,

²⁷ DSM-IV Codes are the classifications found in the Diagnostic and Statistical Manual of Mental Disorders, 4th Edition, a manual published by the American Psychiatric Association (APA) that includes all currently recognized mental health disorders.

Hunsley v. Giard, 87 Wn. 2d 424, 436, 553 P.2d 1096 (1976).

P. The claims of outrage against the County and the City withstand summary judgment.

Judge Nichols denied the County summary judgment on Appellants' claim of outrage because reasonable minds could differ as to whether the deputies' conduct was outrageous. CP 1270-72. Judge Collier overturned that ruling only so that all issues in this action would be reviewable on appeal by three wiser people. RP 263. Because reasonable minds could differ as to questions of fact, Appellants' outrage claims belong to a jury.

Reasonable minds could also differ as to whether Petty's conduct was outrageous. See ¶ III.C.3, *supra*. The City does not dispute Petty's misconduct, relying exclusively on its absolute immunity defense. Petty used the power but not the function of her office to interfere with Fearghal's bond with his children, using any means necessary to advance Appellants' harmful separation. Because Petty acted outside scope of her prosecutorial role, Appellants claim of outrage should go to a jury.

Q. Respondents are not entitled to costs or attorney's fees on appeal.

Appellants seeks to hold the City liable for Petty's *non-prosecutorial* acts, not her prosecutorial acts. The City cannot meet its burden to prove the absence of genuine issues of material fact as to whether Petty shed the cloak of absolute immunity by controlling and conducting investigative activities ordinarily conducted by police officers; and by directing Patricia's testimony in civil proceedings, a discretionary act also outside the scope of the prosecutorial function. Instead, the City speciously mischaracterizes Appellants' claims as seeking to hold the City liable for Petty's prosecutorial

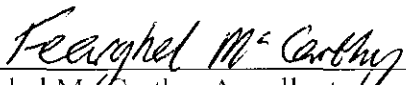
acts to contend that Appellants' arguments are frivolous. Whether Petty engaged in non-advocacy acts is a debatable issue because the line between quasi-judicial and investigative acts by a prosecutor is not always clear. See Imbler, at 431 n. 33. The City's bad faith attempt to seek legal fees not actually incurred, due to its use of in-house counsel, should be rejected. And Fearghal should be awarded all his costs and statutory fees against all Respondents should he be the prevailing party.

IV. CONCLUSION

"False allegations of domestic violence have become a major problem in our society. From the perspective of the wrongfully-accused, such allegations are difficult to refute because of broad and often vague definitions of abuse. From the point of view of victims, such claims undermine their credibility and divert services and protections away from persons in need." "[False] allegations of domestic violence tend to occur when partners are undergoing separation. Such persons have no prior history of violence. In this context, allegations of domestic violence are often to gain a legal advantage." *SAVE, a 501(c)(3) non-profit victim advocacy organization, Incentives to Make False Allegations of Domestic Violence*, pg 1-2, (citations omitted).²⁸

Respondents' ignored any possibility that Patricia's allegations were false. Fearghal had no prior criminal history; and Patricia made the allegations in advance of a dissolution action. All Fearghal's claims should be remanded to a jury for factual determinations.

RESPECTFULLY SUBMITTED ON OCTOBER 16th, 2015.


Fearghal McCarthy, Appellant, pro-se

²⁸ SAVE, Stop Abusive and Violent Environments. This report is available for download at <http://www.saveservices.org/reports/>, (last visited on 8/31/2015).

APPENDIX A

DUTIES OWED BY DSHS TO FEARGHAL

1. Notify Fearghal of its investigation at the earliest possible opportunity. RCW 26.44.100(2); WAC 388-15-045.
2. Seek an in-person response from Fearghal, WAC 388-15-021(2).
3. Seek an in-person response/interview from Conor and Cormac who were both referred as alleged victims. WAC 388-15-021(2).
4. Conduct “a face to face investigative interview with child victims *within 10 calendar days* from the date of intake”. CPS Guide, ¶2331.4.b.
5. Conduct any interviews of the children outside the presence of Patricia and with a third party present. RCW 26.44.030(14)(a)(i); WAC 388-15-021(5).
6. Notify Fearghal of any child interviews. RCW 26.44.030(14)(a)(i); WAC 388-15-045.
7. Make investigative findings within the timeframe established by DSHS rules (60 days in 2005, currently 45 days) not to be extended beyond 90 days; RCW 26.44.030(12)(a); WAC 388-15-021(7).
8. Notify Fearghal in writing of its investigative findings. RCW 26.44.100(2); WAC 388-15-065; WAC 388-15-069.

APPENDIX B

TRIAL COURT RECORD **RE THE SUBSTANTIAL FACTOR TEST**

“The City's attempt to atomize this case by evaluating each officers' action individually, rather than their collective actions, ...should be rejected by this Court.” CP 694, lines 8-10.

“The County and State, however, want to atomize their errors, minimize the cumulative effect and point in every direction but at themselves.” CP 1761, #20-21.

“The County, however, wants to atomize the analysis and, by keeping its many wrongs separate, claim that no one wrong created the harm...” CP 1771. “The County tries to atomize its errors, when it is the cumulative effect.” CP 1769.

“Here’s the context I’m asking the court to look to. This case is piecemealed out - it’s atomized. Individual steps may look rational standing by themselves, but the larger picture, they become very significant. This is a fellow that got crushed not by a single, large boulder or two large rocks that hit him. For the most part multiple grains of sand - I’d offer to you – [if] I would bury you under a ton of sand, it’s just as crushing as if I bury you under a couple big rocks.” RP 49-50, lines 25 and 1-4.

“Now the County and State are doing their best Your Honor as you’ve heard in argument to segregate these steps and say look at this step, this step, this step. We atomize this case because if we look at individual atoms – gosh it made sense. But when you’re on the receiving end of that which are the McCarthy children and Mr. McCarthy – it’s like H₂O atoms. H₂O atoms by themselves is infinitesimal. But enough of them together you had a tsunami that hits Long Island. That’s what happened to them.” RP 237-238.

APPENDIX C

KECK V. COLLINS, No.90357-3 (Sept. 24, 2015)
Extracted Pages from Opinion

FILE

IN CLERKS OFFICE

SUPREME COURT, STATE OF WASHINGTON

DATE SEP 24 2015

Madsen C.J.
CHIEF JUSTICE

This opinion was filed for record
at 8:00am on SEP 24, 2015

Ronald R. Carpenter
Supreme Court Clerk

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DARLA KECK and RON JOSEPH
GRAHAM, wife and husband; DARLA
KECK and RON JOSEPH GRAHAM, as
parents for the minor child, KELLEN
MITCHELL GRAHAM; and KELLEN
MITCHELL GRAHAM, individually,

Respondents,

v.

CHAD P. COLLINS, DMD; PATRICK C.
COLLINS, DDS; and COLLINS ORAL &
MAXILLOFACIAL SURGERY, PS, a
Washington corporation,

Petitioners,

SACRED HEART MEDICAL CENTER, a
Washington corporation,

Defendant.

No. 90357-3

En Banc

Filed SEP 24 2015

MADSEN, C.J.—Darla Keck filed a medical malpractice case against doctors Chad Collins, DMD, and Patrick Collins, DDS (collectively the Doctors) after she experienced complications following sleep apnea surgery. Her claim focuses on the quality of treatment that she received postsurgery, which she alleges fell below the

applicable standard of care. Generally in a medical malpractice claim, a plaintiff needs testimony from a medical expert to establish two required elements—standard of care and causation. RCW 7.70.040; *Grove v. PeaceHealth St. Joseph Hosp.*, 182 Wn.2d 136, 144, 341 P.3d 261 (2014).

The Doctors moved for summary judgment, arguing she lacked a qualified medical expert who could provide testimony to establish her claim. In response to the motion, her counsel filed two timely affidavits and one untimely affidavit from her medical expert. The trial court granted a motion to strike the untimely affidavit. Considering the remaining affidavits, the court ruled that the expert did not connect his opinions to specific facts to support the contention that the Doctors' treatment fell below the standard of care. Therefore, the court granted summary judgment for the Doctors.

The Court of Appeals reversed. Although it agreed that the two timely affidavits lacked sufficient factual support to defeat summary judgment, it held, under de novo review, that the trial court should have denied the motion to strike and should have considered the third affidavit. This affidavit, the court held, contained sufficient factual support to defeat summary judgment.

This case raises two issues.

First, we must decide the standard of review for a challenged ruling to strike untimely filed evidence submitted in response to a summary judgment motion. We hold that the trial court must consider the factors from *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997), on the record before striking the evidence. The

court's decision is then reviewed for an abuse of discretion. In this case, the trial court abused its discretion because it failed to consider the *Burnet* factors.

Second, we consider whether the expert's timely second affidavit¹ showed a genuine issue for trial—that a reasonable jury could return a verdict for the plaintiff—to defeat summary judgment. We conclude it did. On this basis, we affirm the Court of Appeals.

FACTS

On November 26, 2007, Dr. Chad and Dr. Patrick,² performed sleep apnea³ surgery on Darla Keck. The surgery involved cutting bone on the upper and lower jaws to advance them, thereby opening airway space to improve her breathing.

Following the surgery, Keck suffered complications.⁴ On December 6, she went to a follow-up appointment with the Doctors, experiencing pain and exuding green pus from one of her surgical wounds. Over the next several months, she continued to experience pain and swelling and developed an infection in her jawbone.

¹ The substance of the two timely affidavits remained the same, but the first omitted reference to Dr. Patrick Collins. To avoid being duplicative, our analysis will discuss only the second affidavit because it refers to both doctors.

² For the sake of clarity, Dr. Chad Collins will be referred to as “Dr. Chad” and Dr. Patrick Collins will be referred to as “Dr. Patrick.”

³ “Sleep apnea” refers to “brief periods of recurrent cessation of breathing during sleep that is caused esp[ecially] by obstruction of the airway or a disturbance in the brain's respiratory center and is associated esp[ecially] with excessive daytime sleepiness.” WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 130a (2002).

⁴ For a more detailed recitation of the postsurgical facts and the problems experienced by Keck, see the Facts section in *Keck v. Collins*, 181 Wn. App. 67, 73-76, 325 P.3d 306 (2014).

Before this court, the Doctors argue that the Court of Appeals erred by reviewing de novo the trial court's decision to exclude the third affidavit and by reversing that decision. The Keck family raises a second issue, arguing that the Court of Appeals erred by holding the second affidavit insufficient to defeat summary judgment.

ANALYSIS

1. *An order striking untimely evidence at summary judgment requires a Burnet analysis and is reviewed for abuse of discretion*

When we review a summary judgment order, we must consider all evidence in favor of the nonmoving party. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989). Before we can consider the evidence in this case, however, we need to determine what evidence is before us. The trial court struck one possible piece of evidence—Dr. Li's third affidavit—as untimely. To determine the propriety of this decision, we must first settle which standard of review applies.

Relying on a statement in *Folsom* that says the de novo standard applies to “all trial court rulings made in conjunction with a summary judgment motion,” the Court of Appeals reviewed de novo the trial court's ruling striking the third affidavit as untimely. *Keck*, 181 Wn. App. at 79 (quoting *Folsom*, 135 Wn.2d at 663). The quoted phrase from *Folsom*, however, referred to the trial court's evidentiary rulings on admissibility. See 135 Wn.2d at 662-63. It did not address rulings on timeliness under our civil rules. See *id.*

Our precedent establishes that trial courts must consider the factors from *Burnet*, 131 Wn.2d 484, before excluding untimely disclosed evidence; rather than de novo.

review under *Folsom*, we then review a decision to exclude for an abuse of discretion. *See, e.g., Blair v. TA-Seattle E. No. 176*, 171 Wn.2d 342, 348, 254 P.3d 797 (2011) (holding trial court abused its discretion by not applying *Burnet* factors before excluding witnesses disclosed after court's deadline). We have said that the decision to exclude evidence that would affect a party's ability to present its case amounts to a severe sanction. *Id.* And before imposing a severe sanction, the court must consider the three *Burnet* factors on the record: whether a lesser sanction would probably suffice, whether the violation was willful or deliberate, and whether the violation substantially prejudiced the opposing party. *Jones v. City of Seattle*, 179 Wn.2d 322, 338, 314 P.3d 380 (2013).

While our cases have required the *Burnet* analysis only when severe sanctions are imposed for discovery violations, we conclude that the analysis is equally appropriate when the trial court excludes untimely evidence submitted in response to a summary judgment motion. Here, after striking the untimely filed expert affidavit, the trial court determined that the remaining affidavits were insufficient to support the contention that the Doctors' actions fell below the applicable standard of care. Essentially, the court dismissed the plaintiffs' claim because they filed their expert's affidavit late.⁷ But "our overriding responsibility is to interpret the rules in a way that advances the underlying purpose of the rules, which is to reach a just determination in every action." *Burnet*, 131 Wn.2d at 498 (citing CR 1). The "purpose [of summary judgment] is not to cut litigants

⁷ Although the trial court did not evaluate the merits of the third affidavit, the parties appear to agree that this affidavit would have created a genuine issue of material fact to defeat summary judgment. The Doctors, for example, did not challenge the Court of Appeals' holding that the third affidavit was sufficient.

off from their right of trial by jury if *they really have evidence which they will offer on a trial*, it is to carefully test this out, in advance of trial *by inquiring and determining whether such evidence exists.*” *Preston v. Duncan*, 55 Wn.2d 678, 683, 349 P.2d 605 (1960) (quoting *Whitaker v. Coleman*, 115 F.2d 305, 307 (5th Cir. 1940)).

In this case, the trial court abused its discretion by not considering the *Burnet* factors before striking the third affidavit. Aside from noting that the trial date was several months away, which tended to reduce the prejudice to the defendants, the court made no finding regarding willfulness or the propriety of a lesser sanction. We reverse the order striking the third affidavit.

2. The second affidavit created a genuine issue of material fact

We review summary judgment orders de novo, considering the evidence and all reasonable inferences from the evidence in the light most favorable to the nonmoving party. *Folsom*, 135 Wn.2d at 663. Summary judgment is appropriate only when no genuine issue exists as to any material fact⁸ and the moving party is entitled to judgment as a matter of law. *Scrivener v. Clark Coll.*, 181 Wn.2d 439, 444, 334 P.3d 541 (2014).

To establish medical malpractice, Keck must prove that the Doctors’ treatment fell below the applicable standard of care and proximately caused her injuries. *See* RCW 7.70.040. Generally, the plaintiff must establish these elements through medical expert testimony. *Grove*, 182 Wn.2d at 144. The Doctors moved for summary judgment on the ground that Keck had not presented any qualified expert who could reasonably establish a

⁸ “A material fact is one that affects the outcome of the litigation.” *Owen v. Burlington N. Santa Fe R.R.*, 153 Wn.2d 780, 789, 108 P.3d 1220 (2005).

that the defendant surgeon negligently performed surgery. *Id.* The affidavit summarized plaintiff's postsurgical injuries and opined that the injuries were caused by the surgeon's "“faulty technique,”" which fell below the applicable standard of care. *Id.*

To say that a reasonable doctor would not use a faulty technique essentially states that a reasonable doctor would not act negligently. This testimony fails to establish the applicable standard of care—how the defendant acted negligently—and therefore could not sustain a verdict for the plaintiff. Conversely, Dr. Li stated the applicable standard of care and how the Doctors breached that standard: a reasonable doctor would have actually treated Keck's developing infection and nonunion or made an appropriate referral to another doctor for treatment, but here, the Doctors did neither.

Additionally, we note that the expert in *Guile* failed to link his conclusions to any factual basis, including his review of the medical records.¹¹ *See id.* In contrast to the expert in *Guile*, Dr. Li connected his opinions about the standard of care and causation to a factual basis: the medical records. Dr. Li stated that he reviewed medical records in the case and the procedures performed by the defendants, and within that factual review, he identified standard of care violations. CP at 47 (para. 3).

CONCLUSION

Before excluding untimely evidence submitted in response to a summary judgment motion, the trial court must consider the *Burnet* factors on the record. On appeal, a ruling to exclude is reviewed for an abuse of discretion. Applying this standard, we conclude

¹¹It also appears that the expert—an osteopath licensed in Arizona opining about the care owed by an obstetrician/gynecologist in Washington—may have been unqualified to testify about the applicable standard of care. *See Guile*, 70 Wn. App. at 21, 27 n.7

the trial court abused its discretion because it failed to consider the *Burnet* factors before striking the third affidavit.

We also conclude the Court of Appeals erred when it held the second affidavit lacked adequate factual support for the opinion that the Doctors' treatment fell below the standard of care. Because the testimony could sustain a verdict for the nonmoving party, it was sufficient. For this reason, we affirm the Court of Appeals' decision reversing the summary judgment order.

DECLARATION OF SERVICE

I hereby declare that on October 16th, 2015, I served the foregoing REPLY BRIEF OF APPELLANT FEARGHAL MC CARTHY on:

Mr. Taylor Hallvik,
Clark County Prosecuting Attorney Civil Division
PO Box 5000, Vancouver, WA 98666
Taylor.Hallvik@clark.wa.gov

Mr. Alison Croft
Assistant Attorney General of Washington,
PO Box 40126, Olympia, WA 98504
AllisonC@atg.wa.gov
Jodie@atg.wa.gov
PaulK@atg.wa.gov
Torolyeff@atg.wa.gov

Mr. Daniel Lloyd,
Assistant City Attorney,
PO Box 1995, Vancouver, WA 98668
Dan.Lloyd@cityofvancouver.us


Ms. Erin Sperger
Attorney for Conor and Cormac McCarthy
1617 Boylston Avenue
Seattle, WA 98122
erin@legalwellspring.com

by the following indicated method or methods:

☒ by **transmitting via electronic mail in accordance with the agreement of the person(s) served**, a full, true and correct copy thereof to the attorney at the e-mail address number shown above, which is the last-known e-mail address for the attorney's office, on the date set forth below.

I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct on October 16th, 2015 at Vancouver, Washington.


Fearghal McCarthy

FILED
COURT OF APPEALS
DIVISION II
2015 OCT 19 PM 1:18
STATE OF WASHINGTON
BY  DEPUTY